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IN THE PRIVY COUNCIL

No. 31 of 1960

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

B E T W E E N:

JOHN KWESI TAYLOR (Plaintiff) Appellant

- and -

JOSHUA FANYE DAVIS (Defendant) Respondent

INSTITUTE OF ADVANCED
LEGAL STUDIES

68547

CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment of the West African Court of Appeal, dated 28th June 1956, dismissing the Appellant's appeal from a Judgment of Acolatse J. in the Supreme Court of the Gold Coast, dated 30th December 1954, dismissing the Appellant's claim for an account of a timber business carried on by the Respondent as his agent, payment of the share or interest found due, damages for breach of agreement or alternatively a declaration that the Appellant and Respondent were partners, an account of the partnership business and dissolution thereof.

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p.32

p.20

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2. The Appellant is hereinafter referred to as "the Plaintiff" and the Respondent as "the Defendant".

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3. The principal issue to be determined in this Appeal is whether a Referee appointed to go into accounts and report his findings to the Court exceeded his terms of reference by deciding certain questions of law and fact and whether the Courts below should have accepted his findings although no evidence was called before the trial judge.

4. In the course of the proceedings before the Referee and in the Supreme Court reference was made to an Agreement, dated 31st August 1945, whereby the Omanhene of Assin Apimanim State in the Central Province of the Gold Coast granted a concession to

pp.43-47

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the Defendant as a timber contractor permitting him to fell timber trees and manufacture and haul timber logs over a portion of Basofi land measuring 20 miles square. The said Agreement was marked "1" for identification but was never made an exhibit.

5. On the 31st January 1946, the Plaintiff and Defendant entered into an Agreement reciting, inter alia, that the Plaintiff as principal had advanced £200 to the Defendant as Contractor for the purposes of the Agreement with the Stool of Assin Apimanim, that the intention of the parties was to carry on a timber business in the area covered by the Basofi land for a period of 10 years. The Agreement contained the following provisions:-

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pp. 50-51

"NOW THESE PRESENTS WITNESS that in consideration of the premises and of the advance in money already made and to be made in the future by the Principal towards the performance of the duties and obligations on the part of the Contractor to be discharged in respect of the contract with the Assin Apimanim Stool the said contractor doth hereby COVENANT with the Principal that he will faithfully carry out the said duties and obligations during the currency of the Agreement with the Assin Apimanim Stool with the help advice and assistance of the Principal and that in return therefor he will after deduction of all working expenses and other outgoings either weekly or otherwise as may be agreed upon pay to the Principal one half of the amount of profits realised on the sale and disposition of all Timber and Timberlike trees, Boards, etc. obtained from the said Basofi land by virtue of the said Agreement with the Assin Apimanim Stool AND the Contractor doth hereby assign all his claims rights interests and benefits arising under and by virtue of the said Agreement to the Principal as a Disclosed Principal under that Agreement AND THE PRINCIPAL doth hereby covenant with the Contractor that he will continue as heretofore in giving all necessary assistance to the Contractor towards the due performance of the said Contract.

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AND it is hereby mutually agreed and declared

10 that the benefit of the Contract with the Assin Apimanim Stool shall be vested in the said Principal, his heirs, Successors Representatives and Assigns and that as long as the Contractor carries out his part of the said Contract he shall be entitled to retain for himself one half of the said Nett Profits as aforesaid AND FURTHER that in the event of the death of the Contractor all interest accrued due to him at the date of such death but not otherwise shall be paid to the Legal Personal Representative of Family of the Contractor by the Principal, and or his heirs successors personal representatives and Assigns."

6. By a Writ of Summons, dated 21st January, 1953, p.1
the Plaintiff instituted

THE PRESENT SUIT

20 claiming an account of the timber business carried on by the Defendant as his agent, payment of his share or interest under the said Agreement and damages for breach of the Agreement. Alternatively, he claimed that he and the Defendant were partners under the said Agreement, that an account be taken of the partnership transaction or business and for payment of the amount found due to the Plaintiff under the said Agreement, and the dissolution and winding up of the partnership business. By his said Writ and by his Statement of Claim, filed on the 8th April 1953, the Plaintiff pleaded that he had performed his part of the said Agreement by advancing such sums of money to the Defendant as the Defendant required from time to time for the said timber business or contract but that the Defendant had not, when required by the Plaintiff, paid to the Plaintiff his share of the nett proceeds of the said timber business or furnished the Plaintiff with any account thereof although required several times by the Plaintiff so to do.

p.2, 1.11 and
p.4, 1.15

p.3
p.4, 1.1

40 7. By his Statement of Defence delivered on the 23rd April 1953, the Defendant pleaded that under the said Agreement it was a condition precedent to any liability on the part of the Defendant that the Plaintiff should from time to time pay sums of money to the Defendant when and as required for the carrying out of the contract and that, by reason of the Plaintiff's failure to advance such sums, he had to carry on the contract with his own money. He further pleaded that about the latter part of 1948

pp.5, 6

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- p.9 at the request of the Plaintiff accounts were taken between the parties by one Ayornoo which showed that the Plaintiff was indebted to the Defendant, that the books kept in the ordinary course of business namely ledger, journal and cash book, were then taken away by the Plaintiff and were still in his possession, that after such taking of accounts all business relations under the Agreement were by mutual agreement terminated and the Defendant thereafter carried on his own business, and that the Plaintiff in 1949 (later amended to November 1952) attempted by an arbitration to effect a reconciliation with a view to renewing business relations with the Defendant but failed. The Defendant counter-claimed the sum of £1,351.6.3d as representing the price of timber logs and mahogany curls supplied to the Plaintiff and two loans to the Plaintiff of £100 and £850 respectively. 10
- pp.7-8 8. By his Reply to the Statement of Defence, dated 11th May 1953, the Plaintiff denied any condition precedent as alleged by the Defendant and pleaded that under the said Agreement he had advanced from time to time various sums of money to the Defendant to the total of £1,980.6.5d against which the Defendant had supplied timber and curls and repaid the Plaintiff monies amounting to the total of £1,351.6.3d, leaving a balance of £629.0.2d in the Plaintiff's favour. He denied that accounts had been taken between the parties in 1948 by one Ayornoo or by any person or that he had retained the books as alleged and averred that all timber business carried on by the Defendant was conducted as the Plaintiff's agent. He further pleaded that the arbitration referred to in the Statement of Defence was abortive and that no award was made between the parties and denied that the object of the said arbitration was to renew the timber business relations between the Defendant and himself. He further denied that he was indebted to the Defendant in the sum counterclaimed or in any sum whatsoever. 20 30 40
- p.10 9. On the 23rd June 1953, the hearing began before Acolatse J. The Plaintiff gave evidence that he went with the Defendant to the Omanhene of Assin Apimanim State with a view to obtaining the concession. The Chief demanded £200. He, the Plaintiff, gave the Defendant a cheque for £200 to pay over to the Chief. He had given the original of the Agreement to his Counsel who had informed

him that it had been misplaced. He produced a copy which was accepted by consent and marked "Exhibit A". His evidence continued as follows:-

10 "The Defendant did not advance any money in the business. The Defendant and I were to share the nett profit of the business on 50 - 50 basis. I carried out my part of the agreement. I advanced money from time to time to Defendant for the business. The Defendant kept the books in connection with the business which I checked from time to time. The books were and are still in possession of the Defendant. I have served notice on Defendant to produce the books this morning. It was filed on 22.6.53." p.11

20 "ORDER REFERRING ACCOUNTS TO REFEREE BY CONSENT:- At this stage question of accounts involved to be referred to E.J. Blankson, Court Clerk to go into accounts and report his findings to the Court. Each party to deposit £5.5.0d into Court. p.11

Remuneration to the Referee - E.J. Blankson at £1.1.0d each sitting.

BY COURT:- Usual Order

sgd. C.S. Acolatse
J."

30 10. The proceedings before the Referee lasted from 30th June 1953, to 25th May 1954. On 4th August 1953 Counsel for the Defendant stated that a notice had been filed for the Plaintiff to produce the cash book, ledger and journal formerly kept by the Defendant which had been taken away by the Plaintiff on the termination of the Agreement. Counsel for the Plaintiff stated that these books were not in his client's possession and that the Plaintiff had not removed any books from the Defendant. The arbitration had decided that the Defendant must continue business so the books were left with the Defendant. On 3rd September 1953, the Plaintiff 40 deposed (inter alia) that he had paid sums totalling £1,980.6.3d to the Defendant between 31st December 1945 and 27th August 1948 and that part payment of these advances had been made to him by the Defendant amounting to £1,351.6.3d. An arbitration or meeting was held at Bereku in 1948 when £800 was advanced by p.73, 1.10 p.77

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him to the Defendant for the business. Those present included Mr. Edwards, Mr. Tetteh Wuddah, Mr. C.N. Ayornoo and a clerk, Ayornoo. It was his intention to stop the business transaction with the Defendant, but after the meeting it was agreed that the Defendant should continue the business. A voucher book and pay sheet were produced from the custody of the Defendant, who kept them after the arbitration. £800 was the amount found to be due to him by the Defendant. The Defendant had made no account after arbitration. In cross-examination he denied that Ayornoo found that he was indebted to the Defendant.

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p.88, 1.30

11. On the 8th October 1953 the Referee applied to the Court for leave to admit evidence on behalf of the Defendant that he had given moneys and or loans to the Plaintiff apart from the amount counter claimed. Acolatse J. passed the following order:-

p.89, 1.41

"REFEREE

Take all available evidence of parties to assist you in the taking of accounts in this matter to arrive at your conclusion of facts.

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(Intd.) C.S.A.J."

12. Evidence for the Plaintiff was also given by the following:-

p.92, 1.30

Gilbert Abram Edwards, Catechist at the Methodist Church at Asin Nyankumasi, deposed that he presided over the meeting in February or March 1948, that the Defendant admitted a deficit of £800 and that books were brought by the Defendant but he could not say who took them after the meeting. It was decided the parties must continue the business until the amount was settled.

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p.94, 1.7

Moses Larweh Ayornoo, Clerk to the Plaintiff, deposed that he had been the Defendant's Clerk from April 1947 to April 1948. He was present when accounts were taken at Bereku in 1948 but did not see the Plaintiff take away any books with him.

p.97, 1.12

John Kwegyir Eduful deposed that on 29th November 1952 a meeting was held at Saltpond at which accounts were taken between the parties. The Plaintiff's figures totalled £1,980.6.3d being moneys he had paid to the Defendant. The Defendant's figures totalled £1,660.5.0d. No receipt was produced at Saltpond for £850.

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Thomas Amprofan Aidoo and Josiah Atta Taylor also deposed as to the meeting in 1952. The evidence of the latter included the following:-

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p.99, 1.30

10 "It was alleged by the Referees that Taylor was entitled to £1,980. I understood they were supported by receipts. £1,351 were due to Davies supported by receipts. There was no objection. Davies raised no objection to the Agreement. Davies admitted Agreement was not revoked. Agreement was stamped and sealed. Agreement was taken back by Taylor." p.101, 1.13

Kwame Buamuah deposed that the Plaintiff was doing timber business with the Defendant about a year ago i.e. in 1952 and that he had carried logs from the Defendant's camp for the Plaintiff at that time. p.102, 1.22

20 Tetteh Wuddah deposed that at the meeting at Bereku £800 was mentioned as the amount paid by the Plaintiff to the Defendant and that they reconciled the parties and decided the business should be carried on as before. In answer to the Referee he said that the Plaintiff did not take any book away with him. p.103, 1.4

30 13. The Defendant deposed (inter alia) that the accounts were investigated in 1948 by Ayornoo who discovered that over £800 was due to him by the Plaintiff; that the books had been taken away by the Plaintiff and never been returned; that on 14th December 1950 Plaintiff had brought the original Agreement to him at Bereku where it was destroyed by the Plaintiff in the presence of the Defendant and one Amoah, and that he had acquired the Basofi concession for himself. pp.104-113

40 Christian Nene Ayornoo deposed (inter alia) that he went to Bereku in 1948 where he inspected books produced by the Defendant. He found that the Defendant had put in a little more money than the Plaintiff because the latter had been drawing some of his money. Tetteh Wuddah and Edwards were called in to attempt to bring about reconciliation but the attempt proved to be abortive. The ledger, cash book, voucher book, pay sheet book and journal were removed by the Plaintiff. Some years afterwards in December 1952 he was invited by some people at Saltpond to appear before them in respect of the accounts. He attended the meeting but the Plaintiff pp.117-122

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did not put in an appearance.

p.113, l.38

Jacob Benoni Affainie deposed he was present at the 1952 meeting and that the books were taken away by the Plaintiff.

p.122, l.25

Isaac James Amoah deposed to a meeting between the parties on 14th September 1950; that the Defendant handed back the Agreement to the Plaintiff who destroyed it in his presence; that the Plaintiff then asked for £400 financial help, and £400 in currency notes were given to the Plaintiff by the Defendant in the presence of this witness.

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p.124

Jacob Webber Neizer deposed that he was present at five meetings at which accounts between the parties were investigated but that the Defendant gave the persons present to understand that accounts had been investigated by Ayornoo in 1948; that the Plaintiff admitted this fact and said that the books had been misplaced by him. Ayornoo was sent for and came to Saltpond but the Plaintiff did not turn up. In cross-examination this witness answered as follows:-

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p.125, l.4

"Q. Did Taylor tell you for what period he was claiming?

A. He told us he was claiming his share of the profit. I do not know what was in his mind. We did not ask him. He claimed up to the day we met in 1952."

pp.124-129

Two witnesses were called from the Bank of British West Africa to produce the Defendant's accounts. Their evidence was to the effect that the Defendant had a credit balance of £23.0.2d in his No. 1 Account and a debit of £4,377.12.9d in his No. 2 Account. He had a fixed deposit of £4,400 made on 20th July 1953 which was set against the overdrafts.

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14. The Referee's report included the following passage:-

p.130, l.26

"The Plaintiff has performed his part of the said agreement by advancing such sums of money that the defendant required from time to time for the said timber business or contract, but the defendant has not, when required by the Plaintiff, paid to the Plaintiff his

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share of the net profits of the said timber business or furnished the Plaintiff with any accounts from time to time of the said business although requested several times by the Plaintiff so to do."

10 The Referee then considered various payments which the Plaintiff alleged he had made to the Defendant amounting to £1,980.6.3d. The Defendant denied receipt of five of these payments amounting to £590. In respect of each of these disputed items the Referee accepted the Defendant's evidence. He next proceeded as follows:-

20 "The Plaintiff alleges defendant has refunded £1,351 to him. I say without any hesitation that in my opinion it is the same amount defendant counterclaims and I find it to be an admission by the Plaintiff of the £1,351.6.3d which defendant alleges were loans paid by him to Plaintiff after 1948 and which is counter-claimed by Defendant. p.145, 1.20

I accept the explanation of the defendant in denying certain amounts in Exhibit "F" alleged to have been invested in the timber business by the Plaintiff. It would appear that the Plaintiff claimed £590 more and I find that the amount actually invested by Plaintiff appears to be:

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	£1,980. 6. 3d
Less	<u>£ 590. 0. 0</u>
Balance	<u>£1,390. 6. 3d."</u>

40 The Referee next found that the Plaintiff had made withdrawals totalling £740 which he had withdrawn from the business and he set this off against the £1,390.6.3d invested by the Plaintiff. He further found that the Defendant had invested in the business a total of £701.11.3d. He also recommended a judgment be entered for the Defendant for the amount of the counter-claim namely, £1,351.6.3d, as representing loans from the Defendant to the Plaintiff. p.146, 1.1
p.146, 1.37
p.148, 1.10

The Referee next stated that there was no evidence to take into consideration the income and expenditure during the period of the business transaction. The evidence of Ayornoo appeared to be p.148, 1.19

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the only available facts in the case regarding the accounts since the books are missing. Ayornoo seemed to have forgotten the particulars but he was unshaken in cross-examination and from his demeanour appeared to the Referee to be telling the truth.

The Referee then continued as follows:-

p.148, 1.31

"I am of the opinion that the business under the agreement was ceased when Ayornoo made the accounts. The defendant agreed to continue business on condition that if Plaintiff was prepared to refund all monies invested by him in the business and that plaintiff refused to do so. I accept the testimony of the defendant and his witness Ayornoo that the Plaintiff removed the account books from the custody of the defendant at Bereku and took them away to Akropong and they are still in Plaintiff's possession. If defendant had any bad intention for any reason he would not have got the accounts ready for the meeting at Bereku in 1948. I accept the evidence of Ayornoo that defendant produced all the books for him to make the accounts in 1948, and I can only say that if the books were in possession of the defendant the only one remedy would have been to report to Police to take whatever action they thought fit.

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I am of the opinion that the defendant gave loans to plaintiff long before any transaction under the agreement was commenced and even after the business was stopped in 1948, as both parties had been friends from their youth. I do not incline to the view that photographers are men of straw. Nana Nkyi Ababio, Ex-Omanhene of Assin Apimanim testified that he knew defendant was a timber dealer long before the Basofi Concession was granted and I am satisfied that the contents of the lease (Identification "1") is clear that the Basofi Concession was granted to defendant.

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I am inclined to believe that the original of the Agreement Exhibit "A" was destroyed by the Plaintiff at Bereku in presence of Defendant and his witness Amoah. I think the copy made for Counsel for Defendant early last year

must have been made from a copy of the Agreement in possession of the Plaintiff, for defendant mentioned that his copy of the agreement was kept by Plaintiff.

10 I believe also defendant's witness Affainie and others that the meeting at Saltpond was held at request of plaintiff, that plaintiff told people present that he had the account books but they were missing, and that meeting was postponed for Ayornoo to be present but, when Ayornoo arrived on the day fixed, plaintiff failed to attend the meeting. The Registered letter, delivery of which plaintiff refused and was returned to Affainie by the Return Letter Office, is sufficient evidence of this fact.

20 I find as a fact that no profit was disclosed from the evidence adduced before me, except that the balance of plaintiff's investment, after several withdrawals by him is £650 and since it seems business was run at a loss, in my opinion parties will not be entitled to anything. Perhaps if the books were available, the actual state of the transaction would have been ascertained. I recommend Plaintiff's action be dismissed."

15. On the 9th October 1954, the hearing purported to be resumed before another judge, namely, Benson, J. The Referee tendered his report and notes of evidence. Counsel for the Plaintiff objected to the reception of these documents on the ground that the Referee had been ordered to go into the accounts under the old rules Order 37 section 33 cap. 4 but not to decide who was the owner of properties etc. or questions of law. He had, in fact, decided questions of law and therefore all proceedings before him were void. Benson J. ruled as follows:-

30 p.12

40 "COURT:- In my view the Referee has gone beyond his terms of reference, by deciding certain questions of fact and law; it is not entirely his fault, as I consider that the issues should have been clarified and, if necessary, decisions reached by the Court, before the matter was sent to a Referee: it is impossible for accounts to be gone into by a Referee unless he knows what has to be accounted for and for what period.

p.13, 1.11

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I think the only course to adopt in this case is to defer the Ruling on the admissibility of the Report and evidence of the Referee, until issues are prepared by the parties, or settled by the Court after which it may be necessary to decide certain matters before sending back to the Referee, or another one."

The hearing was resumed on 22nd November, 1954, when Benson J. stated that he was unaware that the hearing of this case had begun before Acolatse, J., to whom he then referred it. On the 8th December 1954, Counsel renewed his objection to the admission of the Referee's report and Acolatse, J. ruled as follows:-

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p.16, 1.28

"In my opinion it is obvious that the Report should be admitted in evidence at this stage to enable Counsel to argue upon its merits and demerits and any irregularity involved so as to enable the Court to go into the Report whether it should be adopted or rejected. I accept the Report in evidence at this stage and over-rule the objection."

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p.19

In the course of the argument before Acolatse J. counsel for the Defendant submitted that the timber concession was bad in law. Counsel for the Plaintiff objected that this issue could not be raised because it had not been pleaded.

16. By his judgment of 30th December 1954, Acolatse, J. recited the facts as found by the Referee. His judgment contained the following passage:-

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p.23, 1.10

"I agree with the Referee on the fact that the Plaintiff removed the account books away in 1948 after Ayornoo audited the accounts.

I find no difficulty in accepting the finding of facts from the proceedings before the Referee that the Plaintiff owes Defendant the amount claimed on the Counterclaim. The Counterclaim was admitted on oath by Plaintiff in his evidence and it was not seriously contested. I therefore give judgment for the Defendant on his Counterclaim in the sum of £1,351.6.3d against the Plaintiff herein with costs to be taxed."

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It is submitted that the learned judge, who had

not himself seen or heard the witnesses, erred in agreeing with the Referee on the fact that the Plaintiff removed the account books away in 1948 and that this finding lay outside the Referee's terms of reference. The learned judge held that Exhibit "A" was admissible as a copy of the original and then proceeded as follows:-

10 "In construing Exhibit "A" which relates to the operation of a "Concession", I take the view that the foundation of the Agreement is without any legal vestment, inasmuch as the "Concession" lease - Identification "1" - was a Concession in law and the Plaintiff cannot claim any right, title or interest in any agreement based on a Concession which conflicts Section 8(5) of the Concessions Ordinance No. 19 of 1939. I find that the subject matter upon which the Agreement rests and out of which profits of the accounts were to be derived does not exist at all in law or in evidence before this Court. The claim under Exhibit "A" has its roots in the alleged concession which was never validated by the Court".

p.23, l.35

It is submitted that the learned judge erred in deciding an issue which had never been pleaded. Then the learned judge next held as follows:-

30 "I hold that the Referee's Report and Finding is full and comprehensive on all material facts and I accept and adopt it. There was no foundation for Plaintiff's case and no material available before the Referee to determine the accounts in full. The Plaintiff, I hold, is not entitled to accounts on the operation and profits accruing from a Concession, which if produced before the Court, would be held to be null and void. The Plaintiff could not claim any rights based on a Concession dealing in the operation of timber rights which did not come within the ambit of the Concessions Ordinance."

p.24, l.3

40 At no stage in the judgment did the learned judge consider whether the Referee had gone beyond his terms of reference.

17. The Plaintiff appealed to the West African Court of Appeal. The first ground upon which he

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relied was that the judge was wrong to agree with the Referee that the Agreement came to an end in 1948. The Referee had gone outside the scope of his enquiry and decided a question of law. The enquiry was therefore void and the Report valueless. In the course of his judgment Korsah, C.J. said:-

p.36, l.17

"In my opinion this proposition cannot be supported. Certainly the Referee's opinion on questions of law should in no way influence the Court, which alone decides finally the issues of law and fact arising as to the accounts. It is open to the Court to agree or disagree with the findings of the Referee so that, in every respect, it is incumbent on the trial Judge to come to his own conclusions on questions both of law and fact irrespective of what the findings of the Referee may be. I am aware of no authority which supports the contention that because the Referee has discussed questions of law in his report, therefore, the whole of a report, which is in no way ambiguous or uncertain, is void and inadmissible in evidence.

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In my opinion the conclusions of the learned Judge both in law and fact were correct, and it is right to assume that he formed his judgment irrespective of any view expressed by the Referee although he may have been in agreement therewith. It has frequently been laid down that the Court ought not to interfere with a Referee's finding when it is confirmed by the Court below except on the strong ground of manifest error or manifest abuse, circumstances which are not present in this case."

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Coussey, P. and Baker, Ag: J.A. concurred.

18. Final leave to appeal to Her Majesty in Council was granted on 19th November 1956. The Plaintiff respectfully submits that this Appeal should be allowed with costs throughout or that his case should be sent back for a new trial for the following amongst other

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R E A S O N S

1. BECAUSE the Referee was ordered only to go into accounts and report his findings to the

Court and because he dealt with questions of fact and law which were outside his terms of reference.

2. BECAUSE the question as to whether the relationship between the parties was brought to an end in 1952 was outside the terms of reference.
3. BECAUSE the question of the true construction of the Agreement lay outside the terms of reference.
- 10 4. BECAUSE the learned trial judge erred in that he did not himself hear the witnesses but accepted the findings of the Referee regarding disputed questions of fact and the credibility of the witnesses, although such matters were not included in the terms of reference.
5. BECAUSE the learned judge erred in holding that the concession was invalid although this issue had never been pleaded.

DINGLE FOOT.

JOSEPH DEAN.

No.31 of 1960

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

B E T W E E N:

JOHN KWESI TAYLOR (Plaintiff)
Appellant

- and -

JOSHUA FANYE DAVIS (Defendant)
Respondent

CASE FOR THE APPELLANT

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